Dato Yap Peng & Ors v Public Bank Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–91 OF 1996
GOPAL SRI RAM, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA
1 JULY 1997

Emergency Legislation *— Protection of depositors — Order issued by Bank Negara under reg 8(1) of the Essential (Protection of Depositors) Regulations 1986 — Order covering person named in order and agent — Agent defined to include banker — Whether a reg 8 order applied to a person and his banker where a creditor and debtor relationship existed — Essential (Protection of Depositors) Regulations 1986 regs 2 & 8(1)*

Contract *— Frustration — Illegality — Legislative prohibition supervenes to affect contractually undertaken obligation — Prohibition can be overcome by obtaining licence — Application not made to obtain licence — Whether contract frustrated — When does such contract become frustrated*

Words and Phrases *— 'Agent' — Essential (Protection of Depositors) Regulations 1986 reg 2*

On 8 August 1986 Bank Negara, acting under the powers conferred upon it by reg 8(1) of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations'), issued the Essential (Protection of Depositors) (No 14) Order 1986 ('the Order'). The effect of the Order was, subject to the consent of Bank Negara, to impose a prohibition upon the first appellant and all companies in which he had an interest from dealing, either by themselves or through their agents, with their assets. At the time the Order was made, the second to the fifth appellants had borrowed various sums of money from each of the five respondents in this appeal. The first appellant was the majority shareholder of the second to the fifth appellants and had guaranteed the loans. To each respondent, one or more of the appellants had provided security, either in the form of public quoted shares or land. When the respondents were not paid what was due to them under each of the contracts of loan or security transactions they had with one or more of the second to the fifth appellants, they took steps to exercise the rights available to them. In some of the cases, consent was applied from Bank Negara before the forced sale took place. On 19 January 1994, the appellants issued a writ against the respondents claiming, inter alia, a declaration that the sale of the properties was illegal and void. There was also a claim for damages. Each of the respondents delivered their respective defences to the action. Later, each of them took out an application to have the writ and statement of claim struck out under the provision of O 18 r 19 of the Rules of the High Court 1980. These applications were heard together by the deputy registrar who granted them. The appellants then appealed to the judge in chambers. The appeal came before the learned judicial commissioner who affirmed the deputy registrar's

order and dismissed the appeal. It was against his decision that the present appeal had been brought.

Counsel for the appellants submitted that since each of the respondents as bankers was the appellants' agent in respect of the properties they had sold, and the Order did not permit sale by the appellants or their agents, the sale was illegal and void. It was also submitted that the right of redemption and the right to obtain a discharge of charge under each of the relevant security transactions which the appellants had with each of the respondents had been frustrated by the making of the Order. Counsel argued that the judicial commissioner had failed to deal with the issue of frustration and had erred in summarily disposing of the case.

Held, dismissing the appeal:

(1) Where the relationship between a banker and a person or corporation against whom a reg 8 Order was made was not one of principal and agent, but creditor and debtor, or surety and creditor, the Order did not apply. The relationship relied upon in the statement of claim in the instant appeal was one of creditor and debtor and not principal and agent. It was therefore futile to argue that the Order had the effect of prohibiting each of the respondents from disposing of the securities in their hands for the purpose of recovering moneys owed them. The judicial commissioner was entirely correct in concluding that the Order had no application to the fact pattern which the statement of claim disclosed (see p 492G–H).

(2) A supervening prohibition of some contractually undertaken obligation, which could be overcome by obtaining a licence, would only frustrate a contract at once if the person affected by the prohibition could show that no licence could in any event have been obtained. If this was uncertain, then his obligation was to use his best endeavours to obtain the necessary licence, and the contract then only became frustrated if and when all such efforts had failed. In this case, a provision in the Order enabled sale or disposal of the assets with the consent of Bank Negara. It was for the appellants to apply for and obtain that consent in any case in which they wished to exercise their right of redemption over movables or to discharge a charge over immovables. On the facts, this had not been done and the test for frustration of the contracts had not been satisfied. Even if there was frustration, it was self-induced frustration which was not recognized by law (see p 493B–H); *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, *Davis Contractors v Fareham Urban District Council* [1956] AC 696 and *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 followed.

(3) Having scrutinized the statement of claim and having considered the arguments of counsel the court was of the opinion that this

was a plain and obvious case and was suitable for summary disposal (see p 494E); *Rediffusion (Hong Kong) Ltd v A- G of Hong Kong* [1970] AC 1136; [1970] 2 WLR 1264 followed.

[Bahasa Malaysia summary

Pada 8 Ogos 1986 Bank Negara, bertindak di bawah kuasa yang dikurniakannya oleh peraturan 8(1) Peraturan-Peraturan Perlu (Perlindungan Penyimpan) 1986 ('Peraturan tersebut'), mengeluarkan Perintah Perlu (Perlindungan Penyimpan) (No 14) 1986 ('Perintah tersebut'). Perintah tersebut, tertakluk kepada persetujuan Bank Negara, adalah untuk mengenakan suatu larangan atas perayu pertama dan semua syarikat dalam mana dia mempunyai kepentingan daripada menguruskan aset mereka, sama ada secara sendiri atau menerusi ejen mereka. Ketika Perintah tersebut dibuat, perayu kedua hingga kelima telah meminjam pelbagai jumlah wang daripada setiap lima penentang dalam rayuan ini. Perayu pertama adalah pemegang saham majoriti perayu kedua hingga kelima dan telah menjamin pinjaman itu. Satu atau lebih perayu-perayu telah menyediakan cagaran kepada setiap penentang, sama ada dalam bentuk saham yang disebut harga secara umum atau tanah. Apabila penentang-penentang tidak dibayar apa yang terhutang di bawah setiap kontrak pinjaman atau transaksi cagaran dengan satu atau lebih perayu kedua hingga kelima, mereka telah mengambil langkah untuk melaksanakan hak yang sedia ada kepada mereka. Dalam beberapa kes, persetujuan telah dipohon daripada Bank Negara sebelum jualan yang dipaksa berlaku. Pada 19 Januari 1994, perayu-perayu mengeluarkan suatu writ terhadap perayu-perayu menuntut, antara lain, suatu perisytiharan bahawa jualan harta itu menyalahi undang-undang dan adalah terbatal. Terdapat juga satu tuntutan untuk ganti rugi. Setiap penentang kemudiannya menyampaikan pembelaan masing-masing kepada tindakan. Selepas itu, setiap penentang membuat permohonan untuk membatalkan writ dan pernyataan tuntutan di bawah peruntukan A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan-permohonan ini telah didengar bersama oleh timbalan pendaftar yang membenarkannya. Perayu-perayu kemudiannya membuat rayuan kepada hakim dalam kamar. Rayuan dikemukakan di hadapan pesuruhjaya kehakiman yang arif yang mengesahkan perintah timbalan pendaftar dan menolak rayuan. Sebab itulah rayuan ini dibawa terhadap keputusan beliau.

Peguam perayu-perayu menghujahkan bahawa oleh kerana setiap penentang sebagai pengurus bank adalah ejen perayu-perayu berkenaan dengan harta yang telah dijual oleh mereka, dan Perintah tersebut tidak membenarkan jualan oleh perayu-perayu atau ejen mereka, jualan itu menyalahi undang-undang dan adalah terbatal. Ia juga dihujahkan bahawa hak penebusan dan hak untuk memperolehi pelepasan gadaian di bawah setiap transaksi cagaran yang relevan yang perayu-perayu dapati daripada setiap penentang telah dikecewakan oleh pembuatan Perintah tersebut. Peguam berhujah

A bahawa pesuruhjaya kehakiman telah gagal menguruskan isu kekecewaan dan telah melakukan kesilapan dalam menyelesaikan kes secara terus.

Diputuskan, menolak rayuan:

(1) Di mana perhubungan di antara seorang pengurus bank dan
B seseorang atau sebuah perbadanan terhadap mana suatu Perintah peraturan 8 dibuat tidak merupakan di antara prinsipal dan ejen, tetapi pemiutang dan penghutang, atau penjamin dan pemiutang, Perintah tersebut tidak terpakai. Perhubungan itu yang diharapkan dalam pernyatan tuntutan dalam rayuan ini adalah pemiutang dan penghutang dan bukan prinsipal dan ejen. Oleh itu, adalah
C sia-sia untuk mengatakan bahawa Perintah tersebut mempunyai kesan melarang setiap penentang daripada menyelesaikan cagaran dalam tangan mereka bagi tujuan mendapat balik wang yang terhutang kepada mereka. Pesuruhjaya kehakiman adalah betul secara keseluruhannya dalam menyimpulkan bahawa Perintah
D tersebut tidak terpakai kepada corak fakta yang didedahkan oleh pernyataan tuntutan (lihat ms 492G–H).

(2) Suatu larangan yang menghalang obligasi yang diakujanji secara kontraktual, yang boleh diatasi dengan memperolehi lesen, hanya akan mengecewakan suatu kontrak serta merta jika orang yang terjejas oleh larangan itu boleh menunjukkan bahawa tiada
E sebarang lesen langsung dapat diperolehi. Jika ini adalah tidak tentu, maka obligasinya adalah untuk cuba sebaik mungkin mendapatkan lesen yang dikehendaki, dan kontrak hanya dikecewakan jika dan sekiranya semua percubaan sedemikian telah gagal. Dalam kes ini, suatu peruntukan dalam Perintah
F tersebut membolehkan jualan atau pelupusan aset dengan persetujuan Bank Negara. Adalah menjadi tugas perayu-perayu untuk memohon dan mendapatkan keizinan itu dalam mana-mana kes dalam mana mereka ingin melaksanakan hak penebusan mereka ke atas harta alih atau untuk melepaskan gadaian atas harta tak alih. Atas fakta, ini tidak dilakukan dan ujian untuk
G kekecewaan kontrak tidak dipenuhi. Jika pun terdapat kekecewaan, ia adalah kekecewaan yang disengajakan yang tidak diiktiraf oleh undang-undang (lihat ms 493B–H); *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, *Davis Contractors v Fareham Urban District Council* [1956] AC 696 dan
H *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 diikut.

(3) Selepas meneliti pernyataan tuntutan dan mempertimbangkan hujah peguam mahkamah berpendapat bahawa ini merupakan satu kes yang jelas dan sesuai untuk penyelesaian terus (lihat
I ms 494E); *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136; [1970] 2 WLR 1264 diikut.]

Notes

For cases on emergency legislation, see 6 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1560–1688.

For cases on frustration, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1604–1620.

Cases referred to

Dalmia Dairy Industries Ltd v National Bank of Pakistan [1978] 2 Lloyd's Rep 223 (folld)

Davis Contractors v Fareham Urban District Council [1956] AC 696 (folld)

Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154 (folld)

Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524 (refd)

Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong [1970] AC 1136; [1970] 2 WLR 1264 (folld)

Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd [1986] AC 368 (refd)

Legislation referred to

Essential (Protection of Depositors) (No 14) Order 1986
Essential (Protection of Depositors) Regulation 1986 regs 2, 8(1)
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No D1–22–66–1994 (High Court, Kuala Lumpur)

KS Narayanan (*Logan Sabapathy* and *Lau Mei Lyn* with him) (*Logan Sabapathy & Co*) for the appellants.

T Thomas (*K Maniam* with him) (*Skrine & Co*) for the first respondent.

Shamsul-Bahrain bin Ibrahim (*Skrine & Co*) for the second respondent.

Felix Dorairaj (*Lawrence Low* with him) (*Dorairaj, Low & Teh*) for the third respondent.

Nitin Nadkarni (*Lee Hishamuddin*) for the fourth respondent.

CV Das (*John Mathew* with him) (*Shook Lin & Bok*) for the fifth respondent.

Gopal Sri Ram JCA (delivering the oral judgment of the court): On 8 August 1986 Bank Negara, acting under the powers conferred upon it by reg 8(1) of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations'), issued the Essential (Protection of Depositors) (No 14) Order 1986 ('the Order'). That Order reads as follows:

> Essential (Protection of Depositors) Regulations 1986
> Essential (Protection of Depositors) (No 14) Order 1986
>
> In exercise of the powers conferred by reg 8 of the Essential (Protection of Depositors) Regulations 1986, the Governor of the Central Bank of Malaysia makes the following order:
>
> 1 This Order may be cited as the Essential (Protection of Depositors) (No 14) Order 1986 and shall come into force on the date of its publication in the Gazette.

2 Each of the persons named or described in the Schedule is hereby required to comply with the following:

(a) to disclose to the Central Bank of Malaysia on or before 15 August 1986 the value, nature and whereabouts of any monies, properties and assets owned beneficially by Koperasi Sepadu Bhd (hereinafter referred to as 'the Society') whether in the name of any corporation in which the Society has an interest in shares or in the name of any nominee, employee or agent of the Society;

(b) to report to the Central Bank of Malaysia on or before 15 August 1986 the value, nature and whereabouts of monies, properties and assets of the Society in his possession or custody or under his control;

(c) not to sell, dispose of, charge, pledge, transfer or otherwise deal with or dissipate his monies, properties or assets, or the monies, properties or assets of the Society, without prior approval of the Central Bank of Malaysia;

(d) not to remove or caused to be removed from, or send out of or caused to be sent out of, Malaysia any monies, properties or assets referred to in item (c);

(e) to surrender to the Central Bank of Malaysia on or before 15 August 1986 all monies, properties and assets referred to in item (c);

(f) not to leave Malaysia; and

(g) to surrender on or before 15 August 1986 all his travel documents to the Director-General of Immigration,

save that items (f) and (g) shall not apply to the Society.

SCHEDULE

1 Koperasi Sepadu Bhd which includes all its places of business.

2 Dato Yap Peng (NRIC No 3414989)
17 Lorong Chelagi
Damansara Heights
51200 Kuala Lumpur.

3 W Maurice Samson (NRIC No 3459481)
17 Lorong Pantai 6
Pantai Hills
59100 Kuala Lumpur.

4 Gary Yong Yoon Shing (NRIC No 4195462)
4 Lengkok Aminuddin Baki
Taman Tun Dr Ismail
60000 Kuala Lumpur.

5 David Chong Teak Lai (NRIC No 4153713)
84/86B, Jalan Ipoh
51200 Kuala Lumpur.

6 Dr John J Augustin (NRIC No 3200647)
11 Jalan 12/6
46200 Petaling Jaya
Selangor.

7 Dr Choo Kooi Fook (NRIC No 1336375)
3, Jalan Cempaka
Taman Forlong
Setapak.

8 Chong Sang @ Choong Meow Yew (NRIC No 3406024)
986 Starlight Park
Jalan Tampin
70450 Seremban.

9 Any nominee, relative, employee or agent of any of the persons referred to in items 1 to 8 inclusive, or any corporation in which any of such persons has an interest in shares.

Made 8 August 1986

Dato' Jaffar Hussein
Governor
Central Bank of Malaysia

[BNM 5011/2/4/15; PN (PU) 351]

The effect of the Order was, subject to the consent of Bank Negara, to impose a prohibition upon the first appellant and all companies in which he had an interest from dealing with their assets. The Order also contained other prohibitions which are not relevant for the purposes of this case. Among the persons who were prohibited from dealing with the appellants' assets were their agents. The expression 'agent' is defined by reg 2 of the Regulations as follows:

'employee or agent of person' includes:

(a) a director, banker, advocate, auditor, nominee or other person employed or appointed by the person at any time before or after the commencement of these Regulations; and

(b) a person who

(i) has in his possession any property belonging to the first-mentioned person;

(ii) is indebted to the first-mentioned person; or

(iii) has any knowledge or information relating to the business, dealings, affairs or property of the first-mentioned persons;

At the time the Order was made, the second to the fifth appellants had borrowed various sums of money from each of the five respondents before us in this appeal. To each respondent, one or more of these appellants had provided security, either in the form of public quoted shares or land. In respect of those security documents covering movable property, there was in each instrument a clause permitting redemption. The right of discharge (the parallel or equivalent of the English equity of redemption of mortgages under English law) is conferred upon chargors by the provisions of the National Land Code 1965 ('the NLC'). There was, therefore, at the date on which the Order was made, a right in each of the appellants to either redeem or obtain a discharge of charge in respect of the securities each of them had provided to one or more of the respondents.

It is common ground that the respondents were not paid what was due them under each of the contracts of loan or security transaction they had with one or more of the second to the fifth appellants. Accordingly,

A they took steps on, various dates, to exercise the rights available to them, in the case of movable property, under the particular memorandum of deposit, or, in the case of immovable property, pursuant to s 256 of the NLC, to realize the securities in their hands for the purpose of obtaining payment. In some of these cases, consent was applied for from Bank
B Negara before the forced sale took place.

On 19 January 1994, the present appellants issued a writ against the respondents claiming, inter alia, a declaration that the sale of the properties to which we had adverted a moment ago, was illegal and void. There was also a claim for damages. Each of the respondents delivered their respective defences to the action. Later, each of them took out an application to have
C the writ and statement of claim struck out under the provision of O 18 r 19 of the Rules of the High Court 1980. These applications were heard together by the learned deputy registrar who granted them. The appellants then appealed to the judge in chambers. The appeal came before the learned judicial commissioner who, after hearing the argument over several
D days, affirmed the deputy registrar's order and dismissed the appeal. It is against his decision that the present appeal has been brought.

We must pause here and digress a little. We have thus far not spoken about the first appellant. We shall do so now. He was, at the all material times, the majority shareholder of all the other appellants and it is the appellants' case that he was in fact the alter ego of all these companies. He
E had guaranteed the loans to which we referred earlier in this judgment. The learned judicial commissioner thought he had no locus standi to bring the action. In view of the decision we have arrived at, we find it unnecessary to deal with the point. We shall assume, without deciding the point in issue, that he did have locus stand to institute the action.

F To return to the mainstream of the case, the gist of the appellants' complaints as set out in the statement of claim turn upon the applicability of the Order to the relationship that subsisted between each of the appellants and one or more of the respondents.

The learned judicial commissioner held that the Order did not apply
G to the facts before him as disclosed in the appellants' pleading. He, also however, declined to enter upon the second issue raised by the appellants, namely, that the impugned transactions had become frustrated by reason of the Order.

Before us Mr KS Narayanan has, with his usual ability, argued that
H even if the learned judicial commissioner was right in concluding that the Order did not apply to the facts of the case as pleaded so that the sales of the securities was not illegal, nevertheless he was wrong in not going on to deal with the issue of frustration. Had he done so, counsel argued, he would have come to the conclusion that there were serious questions to be tried and that the case was therefore not suitable for summary disposal.
I The burden of Mr Narayanan's submission is that the right of redemption and the right to obtain a discharge of charge under each of the relevant security transactions which his clients had with each of the respondents were frustrated by the making of the Order. As counsel vividly put it, the

moment any of the appellants had any or produced any money, it would be frozen under the terms of the Order thereby making redemption a physical impossibility. We must say at once that we found this argument attractive. It had to commend itself both the merit of logic and the law. A

However, after hearing argument of Mr CV Das of counsel for the fifth respondent, who addressed us first on our invitation, and with whose arguments counsel for the other respondents were in agreement, we find ourselves in disagreement with the submissions advanced on the appellant's behalf. For convenience, we will take each of the points as separately argued before us. B

First the illegality point. If, as the appellants contend, the act of selling the several securities by the respondents is illegal, this must be so only because the Order applies to the relationship in question. Mr Narayanan argued that because of the definition of the expression of 'employee or agent' in the Regulations, each of the respondents as bankers was the appellants' agent in respect of the properties which they each sold. Since the Order did not permit sale by the appellants or their agents, the respondents as bankers (and therefore agents) had no power to sell. The sale was, for that reason, utterly illegal and void. C D

We must at once dissent from this point of view. The expression 'employee or agent' has been defined in the Regulations to include bankers because persons or corporations affected by an order made pursuant to reg 8 may have monies or titles to movables or immovables lodged with bankers for safekeeping. In those circumstances, the banker as agent would be caught by any order made under reg 8. It must not be forgotten that the purpose of an order under reg 8 is to extend its reach beyond the person mentioned in it. Were it otherwise, orders made under reg 8 could be thwarted by individuals or corporations by means of temporarily divesting themselves of assets in favour of banks. The conclusion we therefore arrive at is that bankers are included in the definition solely to cover situations where an agency relationship is presumed to exist or is proved to exist. E F

It follows from what we have said thus far that where the relationship between a banker and a person or corporation against whom a reg 8 Order is made is not one of principal and agent, but creditor and debtor, or surety and creditor, the Order does not bite. The relationship relied upon in the statement of claim in the instant appeal is one of creditor and debtor and not principal and agent. It is therefore, in our opinion, futile to argue that the Order had the effect of prohibiting the respondents and each of them from disposing of the securities in their hands for the purpose of recovering moneys owed them. In our judgment, the learned judicial commissioner was entirely correct in concluding that the Order had no application to the fact pattern which the statement of claim disclosed. G H

So much for the first point. We now turn to the second argument.

In response to Mr Narayanan's submission that the contracts between appellants and respondents were frustrated, Mr CV Das relied on the decision of the English courts in *Dalmia Dairy Industries Ltd v National* I

Bank of Pakistan [1978] 2 Lloyd's Rep 223. He read the following passage from the judgment of Kerr J at p 253 of the report:

> However, leaving aside for the moment contracts affected by war, it is settled law in England (and on the evidence also in India) that a supervening prohibition of some contractually undertaken obligation, which can be overcome by obtaining a licence, will only frustrate a contract at once if the person affected by the prohibition can show that no licence could in any event have been obtained. If this is uncertain, then his obligation is to use his best endeavours to obtain the necessary licence, and the contract then only becomes frustrated if and when all such efforts have failed. In such a situation the 'probability test' never appears to have been applied. It is not reflected in *Andrew Millar & Co Ltd v Taylor & Co Ltd* [1916] 1 KB 402 (a case of wartime illegality which was cited by both parties) or in the discussion of that case in *Atlantic Maritime Co Inc v Gibbon* [1953] 2 Lloyd's Rep 294; [1954] 1 QB 88.
>
> However, whatever may be the position in English law, my task is to make a finding on the evidence about the true construction and effect of s 56 in relation to Indian law and what I have called the 'wait and see' and the 'probability' tests. As to these tests I can only find that on the material before me there is no shred of any evidence, other than Mr Lall's unsupported assertions to the contrary, that the 'probability test' is part of the law of India. It is nowhere reflected in the language of s 56, and I do not see how it can be implied. In *Satyabrata*'s case (at p 326) the Supreme Court followed Lord Wright in *Denny Mott & Dickson v James B Fraser* [1944] AC 265 by quoting from his speech at p 274 where he said:
>
> > 'The issue (frustration or not) has got to be decided by the court ex post facto on the actual circumstances of the case.'

This statement of the law with which we are in entire agreement was affirmed by the English Court of Appeal in the same case. In the present case, there was, as we have said earlier in this judgment, a provision in the Order which enabled sale or disposal of the assets with the consent of Bank Negara. In our judgment it was for the appellants to apply for and obtain that consent in any case in which they wished to exercise their right of redemption over movables or to discharge a charge over immovables. This, on the facts, was not done. If there was frustration, and we hasten to add that there was none, it was self-induced. On the authority of *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, self-induced frustration is not frustration recognized by law. See also *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

In order to determine whether a contract has been frustrated by a supervening event within s 57(1) of the Contracts Act 1950, the test that may be safely applied is that laid down by Lord Radcliffe in *Davis Contractors v Fareham Urban District Council* [1956] AC 696 at p 729:

> Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Needless to say, that because of the provision for consent being applied for and obtained from Bank Negara which appears in the Order, the test is not satisfied on the facts of this case.

It has often been said that the provision of O 18 r 19 of the Rules of the High Court 1980 should be applied only in plain and obvious cases. In determining what is a plain and obvious case, the time taken to argue a particular application is not always relevant. As Lord Diplock observed in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at p 1159; [1970] 2 WLR 1264 at p 1279:

> Normally the hearing of such an application does not involve consideration of elaborate arguments and is of a short and summary character. But the court must have a discretion as to the length of the hearing. There have been cases in England where an application of this kind involved an important question and after elaborate arguments it became plain and obvious that the alleged cause of action was unsustainable so that an order to strike out should be made: *Rondel v Worsley* [1969] 1 AC 191; *Wiseman v Borneman* [1969] 3 WLR 706; *Roy v Prior* [1970] 1 QB 283; and *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.

See also *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 at pp 435–436 and 441.

Having scrutinized the statement of claim and having considered the arguments of counsel advanced before us, we are, as we have indicated earlier, in disagreement with the appellants' contentions advanced before us. In our judgment this is a plain and obvious case and is suitable for summary disposal. The learned judicial commissioner was entirely correct in the decision he arrived at and in the reasons he gave.

In the circumstances we would dismiss the appeal and affirm the orders made below. All counsel agreed to allow us to fix costs. We fix costs as follows. The appellants are to pay RM2,000 to the fifth respondent. To the other respondents we award RM500 each. The deposit of RM500 lodged by the appellants shall to be paid to the fifth respondent as partial satisfaction of its costs.

Appeal dismissed.

Reported by Kevin Ooi